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United States Held Liable Without Proof of Negligence under the Federal Tort Claims Act

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RECENT FEDERAL CASE

United States Liable Without Proof of Negligence under the Federal Tort Claims Act. A recent decision of the Court of Appeals for the Ninth Circuit has reopened a continuing debate which started with the enactment of the Federal Tort Claims Act (referred to herein as FTCA). In *Hess v. United States*,[1] the Government was held liable for the death of a workman who was participating in the repair of the Bonneville Dam on the Columbia River, though the district court found that the Government was in no way negligent.[2] This is surprising in view of the pointed statement of the United States Supreme Court in *Dalehite v. United States*[3] that recovery under the FTCA requires some form of misfeasance or nonfeasance.

The Hess Case

The deceased, George Graham, was employed by the Larson Construction Company, which had a contract with the United States to repair the baffles (concrete protrusions for the purpose of braking the flow of current) on the downstream face of the dam. Prior to performing that task, it was necessary that soundings be taken in the spillway basin at the foot of the dam. Graham was on the tug "Muleduzer" which was to tow a barge into the spillway basin for that purpose. Because certain of the spillway gates controlled by an employee of the Government were left open, the water in the basin was extremely turbulent, causing the tug to capsize and sink. Graham was drowned. His administrator, Henry L. Hess, Jr., brought this action for damages against the United States under the FTCA.

The theory of the claimant, accepted by the court after an extended period of litigation, was that the Government was liable under an Oregon "Employer's Liability Law" which states:

> Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk of danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.[4]

A determination by the United States Supreme Court[5] that the Oregon statute applied even though the injury took place on navigable waters paved the way for the decision in question.

The court of appeals concurred with the district court that no proof of negligence on the part of any agent of the United States was presented.[6]

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[1] 282 F.2d 633 (9th Cir. 1960).
[2] Hess v. United States, 259 F.2d 285 (9th Cir. 1958).
[3] 346 U.S. 15, 45 (1953).
[4] Ore. Rev. Stat. 654.305 (1959).
[5] Hess v. United States, 361 U.S. 314 (1960).
[6] Hess v. United States, 282 F.2d 633, 634 (9th Cir. 1960).

However, in order to impose liability under the Oregon law it is not necessary to find common law negligence, as the law "imposes upon the employer a much higher degree of care than that which it would be obliged to exercise under the common law."[7] The Employer's Liability Act does not make the employer in an enterprise involving risk or danger strictly liable as an insurer,[8] but that point is closely approached, as the State Industrial Accident Commission is empowered to enact a Safety Code, its provisions having all the force and effect of law. Any violation of the code constitutes negligence per se[9] and the common law doctrines of assumption of the risk, negligence of fellow servants, and contributory negligence do not apply.[10]

The FTCA provides that "the United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."[11] Hence the conclusion of the court that since a private individual could be held liable for the death of Graham under these circumstances, the Government could be liable under the FTCA. But this conclusion ignores what the majority of courts have held; that is, "some act of misfeasance or nonfeasance is essential to government liability, since the act does not impose liability without fault, and does not extend to cases of absolute liability . . . ."[12]

HISTORICAL ANALYSIS

Almost as soon as the FTCA was passed, containing the provision that:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable. . . .[13]

a commentator made this dire prediction: "Determination of what constitutes 'negligent or wrongful act or omission' may entangle unwary claimants in intricate legal snarls."[14] The first cases involving the problem were decided in favor of the claimants. In *Ure v. United States*[15] strict liability was imposed upon the Government for flood damage to the claimant's land,

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[7] Hoffman v. Broadway Hazelwood, 139 Ore. 519, 522, 10 P.2d 349, 351 (1932). See also Howard v. Foster & Kleiser Co., 217 Ore. 516, 332 P.2d 621 (1958); Camenzind v. Freeland Furniture Co., 89 Ore. 158, 174 Pac. 139, 144 (1918).

[8] Shelton v. Paris, 199 Ore. 365, 261 P.2d 856 (1953).

[9] *Ibid.* See also Snyder v. Seneca Lumber Co., 207 Ore. 572, 298 P.2d 180 (1956).

[10] Union Oil Co. v. Hunt, 111 F.2d 269, 275 (9th Cir. 1940).

[11] 28 U.S.C. § 2674 (1958).

[12] 91 C.J.S. *United States* § 118, at 295 (1955); *accord,* 54 AM. JUR. *United States* § 94.5, at 90 (Supp. 1960).

[13] Now codified in 28 U.S.C. § 1346 (b) (1958).

[14] Note, 56 YALE L.J. 534, 540 (1947) in which the author goes on to identify specific problems relating to strict liability. See a similar statement in Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act,* 47 MICH. L. REV. 341, 350 (1949).

[15] 93 F. Supp. 779 (D. Ore. 1950), *rev'd,* 225 F. 2d 709 (9th Cir. 1955) (after *Dalehite*).

the water coming from a government-operated irrigation system. In *Boyce v. United States*,[16] a district court held that except for the "discretionary function" exception, strict liability would be imposed for an injury resulting from blasting by army engineers, it being an ultra-hazardous activity. In another case[17] it was held that the Government was strictly liable for plane-crash damage under the common law rule of strict liability for ultra-hazardous activities, the court saying that the term "wrongful" in the FTCA included acts giving rise to strict liability. Each of these decisions was made by a district court and each of them involved ultrahazardous activities. The next year a district court held contrary in a comparable situation. It decided that liability without fault could not be imposed upon the Government under the FTCA where a man looking for scrap metal was injured by the explosion of an active bomb fuse.[18] In the same year, the Court of Appeals for the First Circuit announced the same rule by way of dictum.[19]

In 1953 the Supreme Court made a declaration which should have put an end to the controversy while it was still in the formative stage. A shipload of government-owned ammonium nitrate fertilizer caught fire and exploded at Texas City, killing several hundred people and injuring many others. When the first suit arising from the tragic incident reached the Supreme Court, the claimants were denied relief. The Court rejected the argument that strict liability could attach to such operations under the FTCA:

> [T]here is yet to be disposed of some slight residue of theory of absolute liability without fault. . . . [T]he Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engaged in the dangerous activity. . . . So it is our judgment that liability does not arise by virtue either of United States ownership of an "inherently dangerous commodity" or property, or of engaging in an "extra-hazardous" activity.[20]

The decision, although an explicit interpretation of this aspect of the act, by no means ended the controversy. *Dalehite* has subsequently been modified in other respects by the Supreme Court[21] and there has been widespread dissatisfaction with this portion of the holding.[22]

The above determination of the scope of "negligent or wrongful acts" seems to have resulted in part from the belief of the Court that the act required a "clear relinquishment of sovereign immunity to give jurisdiction of tort actions"[23] to the courts. The Court no longer construes the act this narrowly. In a more recent case, it said, "there is no justification for this Court to read exemptions into the act beyond those provided by Con-

[16] 93 F. Supp. 866 (S.D. Iowa 1950).
[17] Parcell v. United States, 104 F. Supp. 110 (S.D. W. Va. 1951).
[18] Flores v. United States, 105 F. Supp. 640 (D.N.M. 1952).
[19] United States v. Hull, 195 F.2d 64, 67 (1st Cir. 1952).
[20] Dalehite v. United States, 346 U.S. 15, 44-45 (1953).
[21] See, *e.g.*, Indian Towing Co. v. United States, 350 U.S. 61 (1955).
[22] See, *e.g.*, note 47 *infra*.
[23] Dalehite v. United States, 346 U.S. 15, 31 (1953).

gress."[24] This has lead one commentator to conclude the following: "It is now clear that the restrictive attitude, in relation to Government liability under the act, expressed by the Court in the *Dalehite* case is virtually nullified, if not expressly overruled, by the decision of the Court in the *Rayonier* case."[25] The decision of the Court in the *Dalehite* case was by a majority of four to three (Associate Justices Douglas and Clark not participating). It would appear that subsequent changes in personnel have made the *Dalehite* minority into the current majority.[26] The same commentator as above quoted has further concluded that, "there is little doubt that this apparent reversal is due, in part at least, to the substantially changed make-up of the court since its decision in *Dalehite*."[27]

The Supreme Court had an excellent opportunity in the *Rayonier*[28] case to re-affirm its stand against absolute liability under the FTCA in the face of opposition not only from writers, but also from lower courts, but it did not do so. The counter-argument, that the Court likewise ignored an opportunity to overrule this aspect of *Dalehite* in *Rayonier* is not quite correct. The Court cited several cases in which *Dalehite* had been limited and certain of its implications rejected, one of them standing for the proposition that the Government can be held strictly liable under a state statute.[29]

It is also interesting to note that the claimants from the Texas City disaster, after their claims were denied by the Courts, obtained relief directly from Congress.[30] The Committee report on the bill contains language which seems particularly illuminating as to the Congressional attitude toward strict liability.

> [T]he ammonium nitrate fertilizer, an inherently dangerous and hazardous explosive, was introduced into the flow of commerce by the United States Government without proper safeguards and warnings. That fact alone, in the opinion of the committee, is sufficient to place responsibility on the Government...[31]

Dalehite has been further criticized by one commentator[32] because of the determination that the term "wrongful" in the FTCA does not include acts of ultrahazardous character which cause injury to person or property.[33]

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[24] Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957); *accord,* United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 383 (1949).

[25] Angoff, *The Federal Tort Claims Act: A General View,* 37 B.U.L. REV. 387, 390 (1957).

[26] For an analysis of the personnel of the Court on this issue see Peck, *Absolute Liability and the Federal Tort Claims Act,* 9 STAN. L. REV. 433, 436 n.18 (1957).

[27] Angoff, *supra* note 24, at 390.

[28] Rayonier, Inc. v. United States, 352 U.S. 315 (1957). For an explanation see Comment, 31 So. CAL. L. REV. 259, 266 n.56 (1958).

[29] United States v. Pralou, 208 F.2d 291 (4th Cir. 1953), *cert. denied,* 347 U.S. 934 (1954)), cited in Rayonier, Inc. v. United States, 352 U.S. 315 at 319 n.2 (1957). For a discussion, see Peck, *Absolute Liability and the Federal Tort Claims Act,* 9 STAN. L. REV. 433, 434, (1957).

[30] Pub. L. No. 378, 84th Cong., 1st Sess. (1955).

[31] H.R. REP. No. 2024, 83 Cong., 2d Sess. 9 (1954); see also S. REP. No. 684, 84th Cong., 1st Sess. 19 (1955).

[32] Peck, *supra* note 29, at 441-48.

[33] The Court said: "Petitioners rely on the word 'wrongful' though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the act does require some brand of misfeasance or non-

After pointing out that the legal meaning of "wrongful" doesn't require moral fault, seemingly the ground upon which the Court relied, and that to so hold would exclude many torts without good reason, he concludes that, "absolute liability for engaging in an extra-hazardous activity is both a tort liability and a liability for a 'wrongful' act, and hence a liability which may be imposed under the act."[34]

By way of summation, the Court in the *Dalehite* case explicitly stated that the Government could not be held liable on a theory of absolute liability without some misfeasance or nonfeasance,[35] but that decision has been strongly criticized and in fact modified in some respects by the Court itself.

It should be instructive, then, to observe what impact the *Dalehite* decision has had on subsequent decisions of lower courts, and thus on the later development of the controversy.

As might be expected, the majority of decisions involving the problem embody a refusal to hold the Government strictly liable.[36] Almost all of these rely expressly upon *Dalehite*. There is, however, a remarkably large number of cases in which the lower courts have held the Government liable without proof of common law negligence. *United States v. Praylou*,[37] an

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feasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory." Dalehite v. United States, 346 U.S. 15, 45 (1953).

Compare the language used by the House Judiciary committee which added the word in 1942. "The Senate bill covers only claims arising out of 'negligence' whereas the recommended bill uses the phrase 'negligent or wrongful act or omission.' The committee prefers its language as it would afford relief for certain acts or omissions which may be wrongful but not necessarily negligent." H.R. REP. No. 2245, 77th Cong., 2d Sess. 11 (1942).

[34] Peck, *supra* note 29, at 445. See also Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

[35] Dalehite v. United States, 346 U.S. 15, 32-34 (1953). In view of disallowance on other grounds, the statement may be dictum, but it is certainly well-considered dictum.

[36] Porter v. United States, 228 F.2d 389 (4th Cir. 1955) (injury from exploding army detonator not actionable); United States v. Ure, 225 F.2d 709 (9th Cir. 1955) (no liability under ultrahazardous activity reasoning regarding water storage); Williams v. United States, 218 F.2d 473 (5th Cir. 1955) (use of *res ipsa loquitur* not allowed where no showing that the plane crash could not have occurred in the absence of negligence); Strangi v. United States, 211 F.2d 305 (5th Cir. 1954) (no liability where fire being used got out of control); Heale v. United States, 207 F.2d 414 (3d Cir. 1953) (summary dismissal of problem, citing *Dalehite*); Harris v. United States, 205 F.2d 765 (10th Cir. 1953) (no liability for damage to adjoining land inflicted while spraying own land to kill vegetation); United States v. Inmon, 205 F.2d 681 (5th Cir. 1953) (no liability to child injured by explosive left when army camp dismantled); Bartholomae Corp. v. United States, 135 F. Supp. 651 (S.D. Cal. 1955) (no liability for damage inflicted by atom bomb test); Barroll v. United States, 135 F. Supp. 441 (D. Md. 1955) (no liability for damage caused by concussion of firing cannon); Danner v. United States, 114 F. Supp. 477 (W.D. Mo. 1953) (no liability where dike gave way flooding claimant's land).

[37] United States v. Praylou, 208 F.2d 291 (4th Cir. 1953). The Court refused to follow *Dalehite*; liability was found under Uniform Aeronautics Act which provides: "The owner of every aircraft which is operated over the land or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath caused by ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured or of the owner or bailee of the property injured..."

See also Rayonier, Inc. v. United States, 225 F.2d 642, 647-48 (9th Cir. 1955), where

airplane crash case, was decided on a theory of strict liability for injury from an ultrahazardous activity. This seems indistinguishable from the *Dalehite* case, or from the cases following it;[38] the only difference being that the absolute liability was based on a statute rather than the common law, certainly insignificant.

There are other methods by which the Government has been held liable without proof of common law negligence under the FTCA, differing from absolute liability in form but only slightly in practice. One of these is to characterize conduct which might have given rise to strict liability as a trespass, for it has been held by the Supreme Court that the term "wrongful" used in the FTCA includes trespass.[39] Thus, in an airplane crash case[40] very much the same as the *Praylou* case, the Court of Appeals for the Tenth Circuit imposed liability without proof of negligence on a trespass theory. Another method is the use of a presumption established by state law. In *D'Anna v. United States,*[41] the claimant could not prove negligence; but a state statute provided that injury from the operation of aircraft gave rise to a rebuttable presumption of liability, and liability was imposed on that basis. In a large number of airplane crash cases, where it is impossible to prove either negligence or the absence of negligence, such a presumption is tantamount to an imposition of strict liability.

There are several instances where the Government has been free of common law negligence, and yet has been held liable because an agent fell below a higher standard of care imposed by a state statute. It is into this category that *Hess v. United States* falls. A case arising in a very similar situation, decided in the same way, is *American Exch. Bank v. United States.*[42] There liability without proof of negligence was imposed on the United States under a Wisconsin "Safe Place Statute" imposing a duty greater than that required by common law upon the owner of the premises. It was specifically held by the trial court that there was no common law negligence.[43] An almost identical situation is presented where the government is held liable regardless of common law care where a state safety statute is breached giving rise to what is characterized as "negligence per

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the court refused to apply strict liability under a Washington Statute only to have the judgment vacated and remanded by the Supreme Court, 352 U.S. 317 (1957), though without mention of that particular ground.

[38] See, *e.g.,* United States v. Taylor, 236 F.2d 649 (6th Cir. 1956), which arose under the same statute. It, however, followed *Dalehite,* saying that a statute imposing strict liability is inapplicable when the suit is under the FTCA.

[39] Hatahley v. United States, 351 U.S. 173 (1956).

[40] United States v. Gaidys, 194 F.2d 762 (10th Cir. 1952); *accord,* Dahlstrom v. United States, 129 F. Supp. 772 (D. Minn. 1955) (flight one hundred feet above ground was a trespass under state law, and thus "wrongful" under the act. Denial of recovery under "discretionary function" exception to the FTCA reversed on appeal. 228 F.2d 819 (1956)).

[41] 181 F.2d 335 (4th Cir. 1950); *accord,* United States v. Kesinger, 190 F.2d 529 (10th Cir. 1951) (airplane crash); Sapp. v. United States, 153 F. Supp. 496 (W.D. La. 1957) (*res ipsa* applied to plane crash); Parcell v. United States, 104 F. Supp. 110 (S.D. W. Va. 1951) (airplane crash).

[42] 257 F.2d 938 (7th Cir. 1958); *accord,* Schmid v. United States, 273 F.2d 172 (7th Cir. 1959) (Illinois Scaffold Act).

[43] Williams v. United States, 145 F. Supp. 4 (W.D. Wis. 1956).

se."[44] It might be said that these "statutory standard of care" situations do not come within the scope of *Dalehite,* but they certainly predicate liability, not upon some act of "misfeasance or nonfeasance,"[45] but rather, upon some high standard closely approaching that of absolute liability. It would seem that there is no logical place between them to draw a line between Government liability and nonliability. If liability is to be imposed in the one, then it should be imposed in the other and vice versa.

Thus, the question raised by the *Hess* case is whether the United States should be compelled to pay claims under the FTCA where no negligence is shown. As indicated by the discussion, there is no unanimity of feeling among the courts. Neither is there unanimity among the commentators, some favoring the rule established in the *Dalehite* case,[46] and a slightly larger number advocating its abandonment.[47] It does seem that the problem requires more careful and thorough consideration by the courts.[48]

CONGRESSIONAL INTENT

In this connection, it would be instructive to consider the reasons for which Congress originally passed the act. A similar bill was introduced in the 77th Congress, and speaking in its behalf in his message to Congress on January 14, 1942, President Roosevelt made the following points.[49] A great amount of time and effort of both Congress and the Executive are consumed by private bills. During each of the prior three congresses more than 2000 private claim bills were introduced, of which less than twenty per cent became law. One-third of all bills vetoed by the President during that period were private claim bills, and it cost almost $200 in direct expenses alone to pass each one, often well in excess of the amount prayed for. The procedure is slow and unfair as well as expensive, and providing for judicial relief would aid efficient government and in particular the war effort.

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[44] Cronenberg v. United States, 123 F. Supp. 693 (E.D.N.C. 1954) (failure to put flares the required two hundred feet from stalled truck on roadway); Worley v. United States, 119 F. Supp. 719 (D. Ore. 1952). See also Annot., 1 L. ED. 2d 1647, 1654 (1956).

[45] Dalehite v. United States, 346 U.S. 15, 45 (1953).

[46] Otten, *The Federal Tort Claims Act and Other Statutes Relating to Government Liability: Exemplification by Government Aircraft Incidents,* 65 DICK. L. REV. 35, 51 (1960); Seavey, *"Liberal Construction" and the Tort Liability of the Federal Government,* 67 HARV. L. REV. 994, 996-1001 (1954); Note, 23 GEO. WASH. L. REV. 106 (1954); Note, 24 TENN. L. REV. 1062 (1957).

[47] Schwartz, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD 303 (1954); Peck, *supra* note 29; Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act,* 47 MICH. L. REV. 341, 350 (1949); Comment, 31 So. CAL. L. REV. 259, 266 (1958); Comment, 56 YALE L.J. 534, 542 (1947); Note, 23 TENN. L. REV. 243 (1954); Note, 1958 U. ILL. L.F. 457.

[48] Comment, 45 KY. L.J. 518, 525 (1957): "It is immediately apparent from an examination of the leading cases dealing with strict liability under the Act, that the problem has not been adequately probed, either from a policy standpoint or from the standpoint of orthodox statutory interpretation."

[49] H.R. REP. No. 2245, 77th Cong., 2d Sess. 6 (1942); see also H.R. REP. No. 1287, 79th Cong., 1st Sess. 2 (1945); Gellhorn & Lauer, *Federal Liability for Personal and Property Damages,* 29 N.Y.U.L. REV. 1325, 1328-29 (1954); Holtzoff, *The Handling of Tort Claims Against the Federal Government,* 9 LAW & CONTEMP. PROB. 311 (1942).

It has been pointed out by other authorities that Congress is just not equipped to handle proceedings which are by nature adversary and require determinations of fact.[50]

Thus it would seem that it was a primary desire of Congress to be rid of private claims in areas which could be handled by the courts. It is arguable that in order to implement this intent, the FTCA must be liberally construed,[51] else claims will still ultimately end up in the hands of Congress, as happened in the *Dalehite* case. There is some evidence of contrary intent,[52] but it seems inconclusive in view of these overriding reasons for the bill's passage.

Because Congress intended that the courts take much of the load that it had been carrying in this regard, the courts would do well to see how Congress has treated instances of liability without fault. That certain well-settled practices exist in Congress is evidenced by a commentator, who said:

> We believe... that the work of the committees produces not a mere "myriad of single instances," but a reasonably coherent common law.
>
> Predictability of outcome implies, of course, that the committees tend to follow their own prior legislative recommendations much as courts follow their precedents.[53]

If it were found that Congress has refused relief in "liability without fault" situations, there would be ample warrant for the courts to deny relief, but the contrary is the case. Reference has already been made to the fact that Congress assumed liability for the Texas City disaster after relief had been denied by the courts in the *Dalehite* case. Another "liability without fault" situation handled by Congress has been described as follows:

> Similarly, in the case of Robert Hilton, the Senate Judiciary Committee recommended acceptance of governmental responsibility for injuries suffered by a child in the explosion of a grenade he had found on an Army post. Negligence had not been proved, and the courts in three strikingly similar cases had held that it could not be inferred from the surrounding circumstances.... Beyond a doubt, however, the physical agent of destruction was federally owned; and, while noting the complete absence of proof of negligence, the Judiciary Committee expressed "belief that there was a lack of due care upon the Army authorities in the control of such a dangerous instrumentality."[54]

Two examples are found where, during the Eighty-Second Congress, victims of airplane crashes were compensated through the procedure of private bills, even though in both cases it was specifically found that there had

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[50] Gellhorn & Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1, 36 (1955). See also, S. REP. No. 1011, 79th Cong., 2d Sess. 25 (1946).

[51] This argument was accepted in United States v. Praylou, 208 F.2d 291, 294 (4th Cir. 1953). See also United States v. Yellow Cab Co., 340 U.S. 543 (1951).

[52] See note, 23 GEO. WASH. L. REV. 106, 109-10 (1954).

[53] Gellhorn & Lauer, *Congressional Settlements of Tort Claims against the United States*, 55 COLUM. L. REV. 1, 13 (1955).

[54] Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U.L. REV. 1325, 1334-35 (1954) quoting from S. REP. No. 1259, 83rd Cong., 2d Sess. 5 (1954). The bill, S. 857, 83d Cong., 2d Sess. (1954), was signed by the President on June 18, 1954.

been no negligence on the part of the government.[55] These bills would indicate a willingness on the part of Congress that the Government be held liable without proof of negligence in certain situations, including those where the injuries arise from an ultrahazardous activity or instrumentality.

CONCLUSION

Ultimately the question is one of policy, requiring a balancing of conflicting interests—the danger of deterring activities beneficial to the public by the imposition of liability as against extending the area wherein one injured by an agent of the Government is left without relief. It seems doubtful that the United States would be deterred from flying military aircraft, testing atom bombs, engaging in irrigation and flood control projects, or similar hazardous activities merely because of the threat of lawsuits by injured persons. The countervailing factors, however, are persuasive. The Government is the only agency which has control of these instrumentalities, and thus the only one able to take precautions and institute safety measures. Hence, the imposition of liability would tend to promote all possible care at the only point where it could be exercised. Further, it is difficult to imagine any difference between the Government and a private person sufficient to warrant the application of different rules in regard to strict liability. Lastly, the question has been asked,

> Is society best subserved in using the common law concept of "fault" as a measuring rod of governmental responsibility, or should the test be predicated upon the economic fact that a government is the best of all possible risk spreaders and that perhaps the taxpaying public should ordinarily bear the losses resulting from governmental activity?[56]

The Supreme Court has recognized this element of the FTCA:

> Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees.[57]

Under risk allocation analysis there is strong reason to urge that the Government be held strictly liable in these appropriate situations.

In light of these considerations, then, it would appear that the court of appeals did not err in its conclusion in *Hess v. United States.* The decision is in accord with a number of others concerning the ability of a state to impose a high degree of care on the Federal Government, and though practically speaking it is contrary to *Dalehite,* it therein joins a virile minority, and seemingly adheres to the better rule in light of Congressional intent and underlying policy considerations.

GORDON G. CONGER

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[55] S. REP. No. 68, 82d Cong., 1st Sess. (1951); S. REP. No. 49, 82d Cong., 1st Sess. (1951). See also S. REP. No. 389, 82d Cong., 1st Sess. (1951)

[56] Comment, 45 KY. L. J. 518, 527.

[57] Rayonier, Inc. v. United States, 352 U.S. 317, 320 (1957).